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NOTICE THROUGH AN AGENT.

The time worn phrase, "Notice to an agent is notice to the principal," suggests at once that the courts using it in the decision of cases have relied both upon the fictions of agency and of notice. That they have done so may be proved by even the most cursory examination of the cases. That, for the most part, they have reached consistent results is a tribute to the judicial sense of the judges who have been able to dispense approximate justice, although feeling obliged to announce it in Delphic terms. In this paper it is not proposed to attempt to solve all the difficulties which have been accumulating since the phrase was first coined, but to limit the inquiry, for the greater part, to two questions: 1. How far is a principal affected by notice or knowledge which has been acquired by the agent outside the scope of his employment or before the beginning of his agency; 2. How far is he affected by notice or knowledge where the agent's personal interests are adverse to those of the principal or would be injured by a revelation of the facts. To answer these questions it is necessary to discuss the meaning of the word "notice," although no attempt will be made to define it, and to ascertain a reason for its being "imputed" to the principal. As an addendum, brief consideration will be given to the case of a knowing principal acting through an ignorant agent.

Notice connotes knowledge but does not necessarily mean knowledge. There are in fact two distinct types of notice. The first type exists where one performs an act, specified by legal rules, by which he acquires certain rights against others, who, for the purposes for which the act was done are treated, in general, as having knowledge. In the second type, the only important fact to be determined in connection with notice is whether or not action has been taken with knowledge of certain facts. In the first type we look at the act of the one claiming rights under the notice; in the second, at the knowledge of the one whose responsibility is increased because of it. This distinction is obvious in most cases, but the courts, though acting upon it, have not made the distinction clear in the cases where it is of especial importance, where it is sought to "impute notice" to a principal. Because of the essentially different results obtained in the two types of notice, this distinction may be used as the basis for the division of the cases discussed here.

I. ABSOLUTE NOTICE.

A. The Different Classes of Absolute Notice.

The first type of notice, which exists irrespective both of actual knowledge and of reasonable probability of acquiring it, is created by the performance of an act from which flow all the legal consequences that are of importance from the present viewpoint. This performance may create rights against all the world, against all the members of a class, or against individuals. For convenience this type may be called "absolute notice." [1]

1. Notice to a Class Irrespective of Individual Knowledge.

When the act has a final effect against everyone or against everyone in a given class, no question of agency can be raised. The typical case is that created by the statutes in regard to registration. After the filing of the registered document, every-

[1] See Wade, Notice, 2d Ed., Sec. 97; Bigelow, Fraudulent Conveyances, 2d Ed., p. 598.

one who is in the class of persons affected by such registered documents is treated as if he had read it. For the purposes of the one registering, it is immaterial whether knowledge of the contents comes to anyone. Hence it is equally immaterial whether a person who deals with the subject matter involved acts personally or through an agent. He is bound in either event, not by knowledge but by the act of registration. The same thing is true in the typical case of notice given to a class. Where suitable notice is given of the dissolution of a partnership, it is effective against all not having had previous dealings with the firm whether or not they have seen the notice.[2] Of course there may exist, also, knowledge on the part of a principal or his agent of an unrecorded deed or of the dissolution of a partnership which may result in the same obligations as if the deed had been recorded or the dissolution advertised, but the result is achieved for different reasons.[3]

2. *Notice to Individuals by Performance of an Act Which Normally Gives Them Knowledge.*

The second class of this type of "absolute notice" exists where, by certain acts which normally produce knowledge, rights and liabilities may be determined against particular persons. This situation exists in the case of bankruptcy proceedings, as to creditors; acceptance of guaranty in certain cases, as to the guarantor; vacating premises, as to landlord or tenant; limitation of the liability of carriers, as to shippers; defects in articles, as to buyers; and in others of the same sort. Without discussing whether any particular act is within this class, it is clear that the class does exist and that in all cases within it the one giving notice does an act the effect of which, irrespective of any knowledge being acquired by the one to be effected, is determinative of the rights of both. There is but one ques-

[2] Davis v. Keyes, 38 N. Y. 94 (1868); Jenkins v. Blizard, 1 Stark 418 (Eng. 1817).

[3] In some states the requirement of registration is absolute and knowledge of an unrecorded transfer does not create the obligations created by recording. McDuffee v. Walker, 125 La. 152, 51 So. 100 (1910).

tion to be raised: Was the act done the correct one? The act required in some of these cases may be causing the document to reach a place designated by the other. In other cases it is sufficient to place a properly addressed document in the hands of the postal authorities. That this "notice" has no direct relation to knowledge is seen not only by the fact that the results follow whether or not the one to whom the document was sent receives it,[4] but also by the fact that to qualify as this kind of notice, the act must be performed by the proper party. Thus a notice to quit given on behalf of the landlord by one who did not have authority is ineffective.[5] So also notice of the dishonor of a negotiable instrument must be given by someone who has an interest in the bill.[6] In the case of notice given to satisfy the terms of a contract, the only question is as to the act required by the contract. Thus if a contract of sale provides that notice of defects must be given to the seller, it is a matter of interpretation to hold that notice given to a local office is not sufficient.[7] And where a bill of lading contains directions to "notify B," the court is merely announcing the act called for by the contract when it says that notice to B is notice to the consignor.[8]

It is true that in some of these cases knowledge will have the same effect as if notice had been given. That is not true, however, where the performance of a formality is a part of the obligation assumed, as in the case of the notice required to indorsers of negotiable instruments.[9] In any event, subsequent knowledge is not this kind of notice and presents problems to be dealt with later.

[4] Acceptance of guaranty, Bishop v. Eaton, 161 Mass. 491, 37 N. E. 665 (1894); statutory notice of a lien, Blanchard v. Ely, 179 Mass. 491, 61 N. E. 218 (1901); dishonor of negotiable instrument, Munn v. Baldwin, 6 Mass. 315 (1810).

[5] Doe v. Mizen, 2 Mood. & R. 56 (Eng. 1837).

[6] Godfrey v. Turnbull, 1 Esp. 371 (Eng. 1795); Graves v. Milry, 6 Cow. 701 (N. Y. 1827).

[7] Larson v. Minn. Threshing Co., 92 Minn. 62, 99 N. W. 623 (1904).

[8] Harding v. Chicago, *etc.* Ry., 134 Mo. App. 681, 114 S. W. 1117 (1909).

[9] So also notice of defects in premises as against landlord, Hugall v. McLean, 53 L. T. R. 94 (Eng. 1885), *semble*.

3. *Notice to Individuals by Performance of an Act Which Gives Them Knowledge.*

Another class of this type exists where the one giving the notice is required to bring home knowledge of the facts to the one whom he wishes to effect with notice. This is true, apparently, in the case of notice of dissolution of partnership as to those having had previous dealings with the firm.[10] This would seem to be true also in all cases where one "notifies" another of rights claimed in property or of an assignment of a chose in action. It may be said in these cases that the one who is sought to be affected with notice has no obligations to the other until he has knowledge of the facts which would disclose an obligation to act. For instance, a creditor assigns a claim and the assignee writes to the debtor telling him of the assignment. When the debtor receives the letter, but before he opens it, he may be under no obligation to the sender either to preserve or to open it. But in these cases, as in the others of this type, it is the giving the notice which determines the obligation; the additional element here is that the act of giving notice must include the conveyance of the information. In England the act of giving notice of assignments operates to create rights against prior assignees as well as against the debtor or trustee, something which the mere receipt of information by the creditor or trustee obviously would not accomplish. Thus in *Dearle* v. *Hall*,[11] Lord Lyndhurst said, "The act of giving the trustee notice is, in a certain degree, taking possession of the fund." Although the English rule as to the effect of notice may not be sound, it serves to illustrate the distinction, which has important consequences when applied to the rules of agency, between the act, performed by or on behalf of the party interested, which formally conveys the information, and the receipt of information, which if received by the principal personally, generally has the effect of formal notice. The right to give notice

[10] See Austin v. Holland, 69 N. Y. 571 (1877); Kenney v. Altvator, 77 Pa. 34 (1874).

[11] 3 Russell 48 (1828).

which has a conclusive effect from the fact of its being given must, from its nature, be given by those whose interests are involved and to those whose situation indicates their connection with those interests. Thus in the cases similar to *Dearle* v. *Hall* the notice must be given after the trust has been created, though the trustee may be affected personally and to a limited extent by information acquired previously.[12]

B. Effect Upon the Principal Where Absolute Notice Is Given an Agent.

This question is determined by the rules controlling the making of contracts through agents. Since in all cases of notice of this type, the sole question upon which the validity of the notice depends is whether or not the one relying upon the notice did the required act, where a question of agency is presented, the point is whether or not he directed the document or gave the information, which is the basis of the notice, to the one who had real or ostensible authority to receive it for the one to be affected. If this has been done, in all cases, with one exception subsequently noted, the principal is affected by the notice as if he had received it personally. He is bound in the same way and for the same reason that he is bound by the contracts of his authorized agents. The third person has relied upon the existence of the relationship. Thus where a buyer of goods gives "notice" of defects in the goods, the notice is effectual if he has notified one who, by the custom of business or the designation of the seller, is the one to whom notice should be given.[13] It is as unnecessary in these cases to say that notice is imputed to the principal as it is to say that a principal has notice of a contract made for him through an authorized agent. So where a messenger is sent for goods, the disclosure of a defect to him by the seller relieves the latter from liability to the

[12] Somerset v. Cox, 33 Beav. 634 (1865); The *Société Générale de Paris* v. The Tramways Union Co., 14 Q. B. D. 424 (Eng. 1885).

[13] Hale v. Van Buren, H. & M. Co., 24 Okla. 13, 103 Pac. 1026 (1909); Aultman & T. Co. v. Hefner, 67 Tex. 54, 2 S. W. 861 (1886); Buckeye S. M. Co. v. Rutherford, 65 W. Va. 395, 64 S. E. 444 (1909).

buyer.[14] Surely it is unnecessary to invoke the fiction that "the law conclusively presumes" that the messenger communicated the information, as did the court which, upon that presumption, found the buyer guilty of contributory negligence in taking five grains of morphine, after a warning by the seller, a druggist, given to the messenger that the package sent did not contain the morphine "in doses" as ordered. That this passion for Baconian phrasing did not lead the court into error seems only to have been a bit of good fortune, for in the co-ordinate reasoning upon which the decision was based, the court argued that as it was unlawful for the druggist to sell "doses," the woman ought to have known they were not sent and, because of this, was guilty of contributory negligence saying: "No one can be heard to claim ignorance of a public statute." [15]

It is important to distinguish this type of notice where the performance of an act creates the obligation or the right, from that which is dependent solely upon knowledge of some sort. There are three principal characteristics to be noted.

First. Adverse interest or action by the agent is immaterial, unless known to the notifier. The fact of an adverse interest being held by an agent to whom notice has been given is as irrelevant as it is where an authorized contract or representation is made by an agent. In the same way that a principal is bound in that case by an agent who is acting against his interests, he is bound by notice of this sort given to an agent authorized to receive it, although the latter is actively defrauding him.[16] The alleged rule that a principal is not bound by notice to an agent who has an adverse interest can not apply to this type of cases.

It would seem correct to apply this reasoning to the cases where a bank returns cancelled checks and a statement of accounts to a depositor whose clerk had forged some of the

[14] Dickerson v. Matheson, 57 Fed. 524 (1893); Conrad v. Graham, 54 Wash. 641, 103 Pac. 1122 (1909).

[15] Fowler v. Randall, 99 Mo. App. 407, 73 S. W. 931 (1903).

[16] First Nat. Bank v. Fourth Nat. Bank, 56 Fed. 967 (1893); Walker v. Grand Rapids F. M., 70 Wis. 92, 35 N. W. 332 (1887).

checks, the same clerk having authority to examine the returned checks and accounts. Assuming that the depositor owes the bank a duty to examine the accounts and that he can not recover from the bank if his wrongful failure to notify the bank of the forgeries results in injury to it, it is immaterial who makes the examination. The return of the documents by the bank is a method of giving notice sanctioned by the parties, by usage or agreement. The bank performs its full obligation upon delivering to the depositor, or one authorized to act for him, the documents in such condition that one would be enabled by an examination of them to discover the existence of the fact, *i.e.*, the forgery, which it is important to discover. There is no need of imputing knowledge of the contents to the principal, since his liability becomes fixed at a period after the delivery which affords a reasonable time for examination. The fact that the agent who examines the accounts is one who would not reveal the existence of the forgeries is, then, immaterial. This result is reached in a majority of jurisdictions.[17] To relieve the principal here on the ground that his obligation is limited to selecting for examiners those whom he reasonably believes to be competent and honest, if carried to its logical result, would relieve a principal from the obligations of a contract made for him by a fraudulent agent.

Of course where the one giving the notice knows or should know that the agent to whom it is given is defrauding the principal, he can claim no more rights under it than can one contracting with an agent known to be acting adversely to his principal. He can not take advantage of a known breach of faith.[18] He is barred, not by the existence of an adverse interest on the part of the agent, but by his own fraud.

Second. The principal may be estopped to deny the agent's authority to receive notice. In notice of this type, since the

[17] For a collection of the cases and an analysis of the decisions, see 7 L. R. A. (N. S.) 744.

[18] Ayers v. Green Co., 116 Cal. 333, 88 Pac. 221 (1897); Brown v. Harris, 139 Mich. 372, 102 N. W. 960 (1905); Com. v. Standard Co., 201 Pa. 103, 50 Atl. 1003 (1902).

principal is affected by it in the same way and to the same extent as by a contract made by an agent, there is an opportunity for estoppel to work, so that if notice is given to one who has apparent authority to receive it, the notice is effectual. Were the validity of the notice based upon any presumption of communication, or upon the identity of principal and agent, or upon the liability of a principal for the act of his agent, this result would be illogical. But since the notice is completed by the doing of an act, if one has misled another into thinking that a certain act, *i.e.*, delivering the notice to the agent, will create rights, the first is liable as if the correct act had been done. Thus where an ostensible agent of an insurance company is notified of changed conditions, the company is bound;[19] if the same individual had acquired the information otherwise, the company would not have been affected. The situation is the same where the agency to receive notice had been terminated without the knowledge of the one giving it.[20]

Third. Notice must be given, save where estoppel works, to an agent having authority to receive notice at the time it is given. In this class of cases, except where estoppel works, the notice must come to the agent in the course of his employment. This must be true for unless the notice is so given, the one giving it is not doing the required act, which is to direct the letter or give the information to one who is employed to receive and act upon that particular thing. Thus information given to the general manager of a corporation out of business hours as to the dissolution of a partnership may give him knowledge upon which, if he remembers it, he may be bound to act later, but it is not such notice as from the mere fact of its being given will bind the corporation.[21] When the courts quote the rule broadly given by Pomeroy,[22] that "the information constituting the notice must be obtained by or imparted to

[19] Phoenix Ins. Co. v. Hart, 149 Ill. 513, 36 N. E. 990 (1894).

[20] Springfield Co. v. Kennedy, 7 Ind. App. 502, 34 N. E. (1893).

[21] Compare Marsh, Merwin & Lemmon v. Wheeler, 77 Conn. 449, 59 Atl. 410 (1904).

[22] Equity Jurisprudence, 3d Ed., Sec. 670.

the agent while he is in fact acting as agent," in connection with cases of this type, they are correct and without the necessity of limiting it; their use of the phrase in connection with cases involving the second type of notice, to be presently discussed, is clearly erroneous unless limited.

II. NOTICE WHICH MEANS KNOWLEDGE.

A. Liability of the Principal for the Failure of the Agent to Communicate Knowledge.

The principal is subjected to liability for the failure of the agent to communicate knowledge, as for other wrongful acts of the agent in the course of his duty. This second type of notice, which exists where knowledge alone is the vital element, is distinguished from the first type in that its analogies are found in the law of torts rather than in the rules of contract, as the liability is predicated upon fault of some sort. It may be said generally that in all cases where fault is the basis of liability or of a defence, knowledge is an essential element. There are two typical cases. The first is where one having knowledge of facts which do or should lead him to believe that action of a certain sort on his part will physically injure another or his property, nevertheless takes such action. Cases of this sort usually fall under the head of torts.

The second is where one knows facts which do or should lead him to believe that he will injure the pecuniary interests of another if certain action is taken. The liability here, as worked out by our courts, exists in a restricted range and has been most completely developed in equity. The typical situation is created where one has received the title of property when he knew or should have known from the facts in his possession that a third person had equitable interests in the property. Equity has given relief through the fictions of fraud and constructive trusts, but the basis of the obligation is the same as in the tort cases; an act done by one whose knowledge makes the act, which is in fact injurious to another, wrongful. When a constructive trust is raised because the holder of the legal title knew upon taking it of existing equities, the act of taking

title is of the same nature as that which forms the basis of an action of deceit. Where the taker of the title knew facts from which careful men would have been led to know of the existence of the equities, his act of taking title contains the same element of wrongdoing as that which makes one liable for physical injuries negligently inflicted upon another and the same as that, which upon the facts of *Derry* v. *Peak*,[23] should form the basis of some legal liability. In all of these cases the obligation is the duty not to cause damage, negligently or intentionally, to the interests of another; in all of them the knowledge of the defendant makes the act wrongful.

If a person is made responsible for injuries in both classes of cases for the same reasons, it would seem to follow that the liability of a principal should be determined by the same principles in both. If a master is responsible for the negligent acts of a servant committed in the course of employment, the acts being negligent because of the knowledge which the servant has, or if the principal is liable for the misrepresentations of his agent, whose knowledge of facts made the representations fraudulent, in the same way and to the same extent the principal should be responsible for the act or the failure to act of an agent who is employed to convey certain information or who is required to act in the light of whatever information he possesses. One who employs an agent to ascertain all the facts in regard to the ownership of property should be responsible for the failure of the agent to report that John Doe has an equitable interest in the property, if the agent's failure to do so results in the destruction by the principal of John Doe's interest, in the same way that he is liable if his servant fails to warn John Doe, while a licensee upon the principal's land, of hidden dangers not known to the principal but known to the servant, it being the servant's duty to warn such licensees. In the latter case it is not said that knowledge of the hidden danger is imputed to the principal; he is made liable on the short ground that a master is responsible for the negligent acts of

[23] L. R. 14 App. Cas. 337 (1889).

his servants. And he is liable to the licensee, although if he had employed no servant he would have been safe, as the obligation is to disclose only known defects. In the same way one hiring the title examiner would not have been liable if he had employed no one, as the obligation to equitable owners is based upon knowledge alone. The extent of the obligation and the reasons for its imposition seem to be the same in both cases.

That the liability of the principal is based upon the general rules of *respondeat superior* in cases in which the language of notice has been used, seems clear. Lord Hardwick expressed the reason succinctly in the leading case of *Le Neve* v. *Le Neve*,[24] in holding a principal bound by the knowledge of a solicitor, employed to examine a title, who, for reasons of his own, had failed to report upon the existence of the plaintiff's equity. "If the ground is the fraud," he said, "it is all one whether by the party himself or by his agent." But in spite of the clearness of this enunciation and of the manifest basis for liability, the courts have been practically unanimous in finding it necessary to use the fiction that the principal has knowledge of the facts in order to bind him.

If the courts had used the language, as they have the logic, of Lord Hardwick, we would not now have the discussion as to whether "notice is imputed" to the principal because of the identity of principal and agent, or because there is a "conclusive presumption" that the agent has done his duty.[25] The first reason assigned does not aid us; the second is valuable only when opposed to the facts. Of course the fact that the agent has certain knowledge may be used as evidence to show that the principal has it, and the jury may find in many cases that the agent has communicated.[26] But this has nothing in common with "imputed notice"; personal knowledge on the part of the principal may be found as easily by evidence that a close business friend knew the facts and that the circumstances were

[24] Amb. 436 (1747).

[25] See Mechem, Agency, 2d Ed., Sec. 1805.

[26] Hall B. W. M. Co. v. Haley F. & M. Co., 174 Ala. 190, 56 So. 726 (1911); Thompson v. Central P. Ry., 80 N. J. L. 328, 78 Atl. 152 (1910).

such that probably he disclosed them. These matters of evidence must be distinguished from the principles of substantive law and it is difficult to do so when the courts use the same language for both.

B. Where Knowledge Is Important in Physical Dealings With Property.

The courts have used the fiction of imputed or constructive notice in many cases where a principal has been sued upon a contract or for a tort, where knowledge was important, as well as in cases where it was sought to hold him as a trustee of property because receiving it with knowledge of the rights of third persons in it. There is no reason why it should not be used in one as well as in the other, but there is less apparent excuse for it in the former class and a few of those cases will be considered before proceeding to the latter type.

It is said, for instance, that the knowledge of a servant that an animal has vicious propensities is imputed to the master, who thereupon is made liable for injuries done by the animal.[27] Of course the court is imposing liability because of the act of the servant in the control of the animal, just as it makes the master liable for the negligent control of non-vicious animals. The difference lies wholly in the law of torts. So also where an employee discovers a defect in the plant or apparatus of the employer, the latter is subjected to liability because the employee having some supervision of the property has failed to take such action, either by repairing it or calling the attention of others to it, as will normally prevent injury to third persons[28] or to fellow workmen.[29] To say, as do the courts in these cases, that knowledge is imputed, is to infer that there exists a distinct rule for the solution of these cases apart from

[27] Brown v. Green, 1 Pennewill 535, 42 Atl. 991 (1890); O'Neill v. Blase, 94 Mo. App. 648, 68 S. W. 764 (1902); Lynch v. Kineth, 36 Wash. 368, 78 Pac. 923 (1904).

[28] City of Denver v. Sperret, 88 Fed. 228 (1898); Alexandria M. & E. Co. v. Irish, 16 Ind. App. 534, 44 N. E. 680 (1896); Barres v. Louisville Electric Co., 118 Ky. 830, 85 S. W. 1186 (1905).

[29] Baldwin v. Ry., 75 Ia. 297, 39 N. W. 507 (1888); Indiana, *etc.* Rwy. v. Snyder, 140 Ind. 647, 39 N. E. 912 (1895); Lingreen v. Williams Bros. Co., 112 Minn. 186, 127 N. W. 626 (1910).

the normal responsibility of the master. The same comment applies to other cases of the same sort: where a servant knows of a situation dangerous to others and there is an obligation upon the master that his servants shall use care after such knowledge;[30] where a railroad fails in its qualified obligation to have its servants protect passengers;[31] or where a bailee's servants do not use care in the protection of bailed goods.[32]

In such cases it scarcely needs argument to make it clear that it is immaterial how or when the servant or agent acquired the information which raises the obligation; the only question is one of negligence which must be determined by the nature of the act in view of the total information possessed at the time. Occasionally, however, the courts will confuse this situation with that existing after "absolute" notice has been given, and hold that a principal is bound only where the knowledge is received by the agent in the course of his employment.[33] Most of these cases can be rested upon the ground that there was in fact no obligation upon the agent to act or to make disclosure, in which event there was no wrongful act.[34]

It would seem to be clear, also, that an adverse interest held by the agent relieves the principal only as it does in the case of all torts committed by the agent. A New Jersey court, however, leads us into the scenes of Alice in Wonderland in reaching a result which, nevertheless, is correct, as the agent was acting during the whole transaction for his own purposes only.[35] The defendant's superintendent, unauthorized and for the purpose of taking the action subsequently taken, gave to the plaintiff some of the company's property. Later, in the name of the company, he instituted a criminal prosecution, alleging a theft

[30] Cin., *etc.* Rwy. v. Kassen, 49 Ohio St. 230, 31 N. E. 282 (1891).

[31] Mo. K. & T. Rwy. v. Raney, 44 Tex. Civ. App. 517, 99 S. W. 589 (1907); Wheeler v. Grand Trunk Ry., 70 N. H. 607, 50 Atl. 103 (1901).

[32] H. A. Johnson v. Springfield Ice Co., 143 Mo. App. 441, 127 S. W. 692 (1910).

[33] Goodwin v. Tel. Co., 157 Mo. App. 596, 138 S. W. 940 (1911).

[34] Tate v. Ill. Cent. Rwy., 26 Ky. L. R. 309, 81 S. W. 256 (1904); Price v. Oregon, 47 Or. 350, 83 Pac. 843 (1906).

[35] Hartdown v. Webb. Mfg. Co., 75 Atl. 893 (N. J. 1910).

of the "gift." In the subsequent action for malicious prosecution, the court reasoned that the superintendent, as superintendent did not know that he had given the property away; that knowledge was held only by him, the man. But the superintendent did know that the plaintiff had the property, and this knowledge alone being imputed to the company, the latter had reasonable grounds for instituting the action. The method of reasoning leaves us wondering how the wicked individual was able to conceal from the virtuous superintendent his load of sin.

C. Where the Principal Acquires Property in Which There Are Prior Equitable Rights.

Coming now to the cases where one acquires property in which there are prior equitable rights that can be retained only if there is no fault in the acquisition, or where a contract is made which would be voidable if made with a knowledge of certain facts, it would seem that the situation is essentially the same. If the agent's duty is to act, he commits the fault by not acting or by acting wrongly; if his duty is to reveal, he is guilty of the same wrong in remaining silent, as that of a car inspector who fails to report defective equipment. The great majority of cases reach results consistent with this reasoning. For the purpose of considering how far the courts have departed from it through the use of formulae, it is convenient to divide the cases into two classes: 1. Where the agent having the knowledge, accepted on behalf of the principal, the title to property, or makes the contract through which the principal claims; 2. Where the contract is made or the property acquired by the principal or by another agent, who does not know the facts which, if known would place the principal at fault in acting.

1. Where the Agent Having the Knowledge Alone Acted for the Principal.

In the first place the time and manner of acquisition of the knowledge is immaterial. It is held almost uniformly that the principal takes subject to the equities known to the agent,

whenever or however the information is acquired,[36] even in jurisdictions where, in cases included in the second class above, it is held that the principal is not bound by information acquired by the agent prior to the beginning of the agency.[37] Personal interests and motives of the agent are immaterial, though the same unanimity of opinion does not prevail where the nature of the transaction was such that the probability of the agent's revealing the facts was slight.

These cases, in which the agent was the sole actor for the principal, may be classified as follows:

First. Where the agent obtained from a third person a title or a contract running directly to his principal, by fraud or with knowledge of the equities of others. If it is found that the agent was acting throughout the transaction in the general interests of his employer, all the courts are agreed that the principal can not hold the property or bring an action upon the contract without being subjected to the equitable obligation. He cannot accept the benefit of the agent's act without also accepting the incidents, and this, too, irrespective of whether the "agent" was originally authorized.[38] But where it was clear that the agent had interests adverse to those of his principal, some of the courts upon the ground that "the rule of notice is based upon the presumption that the agent will communicate and that this presumption does not exist where the agent is committing a fraud," have not subjected the principal to liability.[39] Others have reached this result by invoking the rule, "When an agent abandons the object of his agency and

[36] Lockhar v. Wash. G. & S. M. Co., 16 N. M. 223, 117 Pac. 833 (1911); Argentine Min. Co. v. Benedict, 18 Utah 183, 56 Pac. 559 (1898); Hyman v. Barmon, 6 Wash. 516, 33 Pac. 1076 (1893).

[37] *In Re* Heckman's Estate, 172 Pa. 185, 33 Atl. 552 (1896); Fire Assn. v. L. G. & L. C. Co., 50 Tex. Civ. App. 172, 109 S. W. 1134 (1908). *Contra:* Vulvan Detinning Co. v. Am. Can Co., 72 N. J. Eq. 387, 67 Atl. 339 (1907), based upon the peculiar New Jersey rule, and overruling the language of the court in 70 N. J. Eq. 588, 62 Atl. 881, although reaching the same result.

[38] Bodine v. Berg, 82 N. J. L. 662, 82 Atl. 901 (1912); Bennett v. Judson, 21 N. Y. 238 (1860); Saratoga Inv. Co. v. Kern, 148 Pac. 1125 (Or. 1915); Hughes v. Settle, 36 S. W. 577 (Tenn. 1895); Cassiday F. B. & L. Co. v. Terry, 69 W. Va. 572, 73 S. E. 278 (1912).

[39] Gunster v. Scranton, L. H. & P. Co., 181 Pa. 327, 37 Atl. 550 (1897).

acts for himself by committing a fraud for his own exclusive benefit, he ceases to act within the scope of his employment and to that extent ceases to act as agent." [40] Thus for one of these reasons or a combination thereof, the knowledge of the agent did not have the effect of affecting the rights of the principal, where the agent bought property for his principal to whom he had guaranteed the title; [41] where an agent to buy land was defrauding both his principal and the seller; [42] and where an agent obtained fraudently a note running to his principal, personally discounted the note of his principal's bank and used the proceeds.[43]

But, conceding for the present that the rules as stated by these courts exist, they are misapplied. For if the act of the agent who had the information was the sole act by which the property was acquired, or if he alone represented the principal in making the contract, the principal has to rely upon the consciousness of his "extended personality" in order to have any effect given to the transaction, and this consciousness can not be divided. The situation is the same as that where a *cestui que trust* is prevented from succeeding because of the fraud of the trustee; he is barred because of the necessity of tracing his title through the one acting for him. It was said in *Loring* v. *Brodie*: [44] "If Fuller was the instrument of Brodie in committing a fraud on the bank by unlawfully transferring to it the securities of another, whether he concealed the fact or not, the bank could not take the securities from his hands or hold them in its custody, except with the knowledge he had. The only authority the bank could have to hold or sell them was under the contract made by or through Fuller, the cashier." Or, to use the vigorous expression of Judge Lamm in *Thompson* v. *Lindsay;* [45] "The eye of equity can not see her (the

[40] Henry v. Allen, 151 N. Y. 1, 45 N. E. 355 (1896).
[41] Smith v. Boyd, 162 Mo. 146, 62 S. W. 439 (1901).
[42] Cole v. Getzinger, 96 Wis. 559, 71 N. W. 75 (1897).
[43] Lanning v. Johnson, 75 N. J. L. 259, 69 Atl. 490 (1908).
[44] 134 Mass. 453 (1883).
[45] 242 Mo. 53, 145 S. W. 472 (1912).

principal) without seeing him (the agent). It must look through him to see her at all." If in fact it is the mind of the agent that consents and if that mind is fraudulent, it is difficult to understand how the innocence of the principal's mind can relieve him. The argument that the fraudulent agent might have carried on the transaction through other agents or through the principal himself,[46] is beside the point, for in that event it would not have been necessary to make the claim through the "knowing" agent. Though it is difficult to say on which side stands that idol of American law students, "the weight of authority," there is, at least respectable authority in accord with the view here expressed.[47] Some of the cases cited as being *contra* may be placed upon the ground that the defrauded party placed in the hands of the agent the means of injuring the principal or should have known that the agent was acting adversely.[48]

Second. Where an agent acquires property fraudulently or steals property the title to which passes upon change of possession, and transfers it to his principal, the courts are nearly unanimous in holding that the property cannot be retained if the facts make it rational to apply the rule that where one commits a fraud in doing an act which inures to the benefit of another, the one accepting the benefit becomes liable for the fraud. This is the rule where a defaulting treasurer obtains money from another company which he uses to replace the amount of his defalcations and for the purpose of concealing them;[49] or where a note is obtained for the same purpose;[50]

[46] First Nat. Bk. v. Northrup, 82 Kan. 638, 109 Pac. 672 (1910).

[47] Tatum v. Commercial Bk. & Tr. Co., 69 So. 508 (Ala. 1915); Fouché v. Merchants' Nat. Bk., 110 Ga. 827, 36 S. E. 256 (1900); Taylor v. Felder, 3 Ga. App. 287, 59 S. E. 844 (1907); Loring v. Brodie (*supra*); Berry v. Rood, 168 Mo. 316, 67 S. W. 644 (1902). See also the result in Aldrich v. Chemical Nat. Bk., 176 U. S. 618 (1900).

[48] Fort Dearborn Nat. Bk. v. Seymour, 71 Minn. 1000, 73 N. W. 724 (1898); First Nat. Bk. of Nephi v. Foote, 12 Utah 157, 42 Pac. 205 (1895).

[49] Fairfield v. Southport M. Bk., 80 Conn. 92, 67 Atl. 471 (1907); Atlantic C. M. v. Ind. O. M., 147 Mass. 268, 17 N. E. 496 (1888); Newell v. Hadley, 206 Mass. 335, 92 N. E. 507 (1910).

[50] Skud v. Tillinghast, 195 Fed. 1 (1912).

or notes or bonds are issued without authority and the principal retains the proceeds;[51] or the frauds of another company are used by a bank officer for the benefit of the bank.[52] In the case of an insolvent and defaulting agent who replaces, in fraud of his other creditors, the amount of his defalcation, a different result has been reached.[53] Where the principal is not seeking to enforce an obligation, the result should be reached upon the ground of unjust enrichment;[54] if he is enforcing a claim, he is barred by the knowledge of the agent

Third. Where a bank officer deposits in his bank money or notes to which he has fraudulently obtained title, the deposit being for the purpose of concealing or realizing upon his fraud, and later withdraws the funds, if the deposit is made through another agent the situation is the same as where an agent sells to the principal. But where the transaction is wholly completed through the fraudulent agent, the principal has to trace his title through the consenting mind of the agent, just as he does where the property is conveyed directly from the third person. In the case of a note discounted, the analogy seems perfect and the principal is affected by the equities, irrespective of the fact that the result of the transaction will be injurious to him.[55] In the case of a cash deposit, if it is assumed that the agent has authority to receive his own money under all conditions, a debtor and creditor relationship is established, which is affected by the trust as the one establishing it had the guilty knowledge, and when the funds are subsequently drawn

[51] Bannatyne v. MacIver (1906), 1 K. B. 103; Ditty v. Dom. Nat. Bk., 75 Fed. 769 (1896); Washington A. V. M. V. Rwy. v. R. S. Tr. Co., 177 Fed. 306 (1910).

[52] Farmers & T. Bk. v. K. M. Co., 1 S. D. 388, 47 N. E. 402 (1890).

[53] Lindsay v. Lambert Bldg. & L. Assn., 4 Fed. 48 (1880); High v. Opalite Tile Co., 184 Fed. 450 (1911).

[54] This is clearly pointed out by Shaw, C. J., in Atlantic Bk. v. Merchants' Bk., 10 Gray 532 (Mass. (1858).

[55] First Nat. Bk. v. Blake, 60 Fed. 78 (1894); First Nat. Bk. v. Babbidge, 160 Mass. 563, 36 N. E. 462 (1894), *semble;* Le Duc v. Moore, 111 N. C. 516, 15 S. E. 888 (1892); First Nat. Bk. v. Burns, 88 Ohio 434, 103 N. W. 93 (1913); *Contra: In Re* European Bank, 5 Ch. App. 358 (1870), *semble;* Hummel v. Bk. of Monroe, 75 Ia. 689, 37 N. W. 954 (1888); Indian Head Nat. Bk. v. Clark, 166 Mass. 27, 43 N. E. 912 (1896).

out through the same person, this withdrawal will not constitute payment as against the defrauded person.[56] But in this case the bank is not required to take affirmative action nor obliged to claim that it received title. It may be said that the bank was a mere conduit pipe and that the agent retained a *de facto* control over the money. It seems fair to regard the bank as a mere safe deposit box and to ignore the fact that the specific money paid in was not returned. Upon this ground the cases denying remedy against the bank may be supported.[57]

The cases involving notice to corporations are somewhat confused because of the varying ideas as to the authority of corporate officers. The cases cited above show, however, that the courts make a sharp distinction between the knowledge of those officers that are effective in making the agreement or acquiring the property for the company and those that are not active in the transaction. In general, as to the former, there being no necessity of "imputing notice," the corporation is liable, although its officers had a personal interest to conceal or were the officers of the company selling and, as such knew the facts.[58] The chief difficulty is in determining whether the officer with knowledge was an effective cause of the transfer.[59]

2. *Where the Acquisition of Title Was Not Through the Agent Having Knowledge.*

The next class of cases, where the obtaining of the title or the making of the contract was not the act of the agent having the knowledge, requires further subdivisions, these being made with no idea of making a logical arrangement but for the purpose of explaining the results reached. In these sub-

[56] *In Re* Plankington Bk., 87 Wis. 378, 58 N. W. 784 (1894).

[57] School Dist. v. De Weese, 100 Fed. 705 (1900); Brookhouse v. Pub. Co., 73 N. H. 368, 62 Atl. 219 (1905), *semble;* Bienstock v. Ammidon, 155 N. Y. 47, 49 N. E. 321 (1898); Newell v. Hadley, 206 Mass. 335, 92 N. E. 507 (1910).

[58] In addition to cases previously cited see: Louisville & N. Rwy. v. Central Ky. Tr. Co., 147 Ky. 513, 144 S. W. 739 (1912); Vandagrift v. Bates Cty. Inv. Co., 128 S. W. 1007 (Mo. App. 1910); First Nat. Bk. v. Erickson, 20 Neb. 580, 31 N. W. 387 (1887).

[59] See: Hughes v. Settle, 36 S. W. 577 (Tenn. 1895).

divisions, the third and fourth exclude the cases included in the first two.

First. Where the agent's knowledge has given an advantage to the principal, the latter is affected by the knowledge. A principal cannot accept the benefit without also accepting the knowledge that gave rise to it. Assuming that the knowledge is such that the agent either should communicate or refuse to act at all, it becomes a fraud on the part of the agent to act and to refrain from giving the information. If the principal benefits by the fraud, he must surrender the benefits. This is perhaps best exampled in the case of a preference before bankruptcy. Without the knowledge held by the agent who engineers the transaction, of the insolvency of the debtor, it may be assumed as a fact that the transfer of the property would not have been made. If this appears it is, therefore, immaterial when or how the agent acquired the information,[60] even in a jurisdiction, where, in other cases, a principal is not affected by knowledge obtained before the agency began.[61] Even in the extreme case where the information was acquired through confidential communications, the principal cannot retain the property.[62] Of course it is unimportant that the agent once had the information if it is not an operating cause at the time of the transfer, as where he had forgotten.[63] The rule as applied to notice is simply a branch of that general one which will not allow a principal to profit by the fraud of the one acting for him, whether or not the act was previously authorized.[64]

Second. Where the "agent" with knowledge is a transferor, his knowledge does not affect the principal. Cases of this class do not rightly belong in this discussion but are inserted on account of the misleading language of the courts in dealing with

[60] Rogers v. Palmer, 102 U. S. 263 (1880); Nisbit v. Macon Bk. & Tr. Co., 12 Fed. 686 (1882).

[61] Wright v. Hooker, 55 Tex. Civ. App. 47, 118 S. W. 765 (1909).

[62] Brown v. Jefferson Cty. Bk., 9 Fed. 258 (1881).

[63] Taylor v. Evans, 16 Tex. Civ. App. 409, 41 S. W. 877 (1897).

[64] Veazie v. Williams, 8 How. 134 (1850); Bodine v. Berg, 82 N. J. L.

them, and because such cases are often cited as authority for the alleged rule that a principal is not affected by the knowledge of an agent when the latter has adverse interests. The cases are unanimous in holding the principal not bound by the knowledge of the agent.[65] The result is correct beyond question. An agent is one who acts in transactions between the principal and third persons. When an "agent" deals with his "principal" for his own benefit and this is understood between them, he is an adverse party. He is rightly acting for himself and not for his principal, which is exactly what an agent cannot do. He may be an agent in other transactions; he may even be employed as an agent to investigate the title of the property he is selling to the principal. In this case he becomes an agent for the purpose through such special employment, but it is not as such agent that he sells. The obligation imposed upon him as a fiduciary to reveal pertinent facts in regard to the property, a duty existing upon all of that class, is placed upon him personally as a seller and not as an agent. It is therefore unnecessary to say that "notice is not imputed" to the principal because of an adverse interest of the principal.[66] The principal is not bound by the knowledge of the seller because the latter is not his agent in the sale. For this reason, where there was no question raised as to the liability of the "principal," where a president of a bank received as an individual, money to deposit in his bank in the name of the donee, it was held that his knowledge could not be imputed to

662, 82 Atl. 901 (1912); Hughes v. Settle, 36 S. W. 577 (Tenn. 1895).

[65] Thomson-Houston El. Co. v. C. H. El. Co., 56 Fed. 844 (1893); *In Re* Senoia D. M., 193 Fed. 711 (1912); Ga. Milk P. Assn. v. Crane, 137 Ga. 50, 72 S. E. 414 (1911); Seaverns v. Hospital, 173 Ill. 414, 50 N. E. 1079 (1898); J. T. Moore P. Co. v. M. L. Tr. & S. Co., 126 La. 840, 53 So. 22 (1910); Innerarity v. Merchants' Nat. Bk., 139 Mass. 332, 1 N. E. 282 (1885); State Sav. Bk. v. Montgomery, 126 Mich. 327, 85 N. W. 879 (1901); Exchange Bk. v. Neb. U. I. Co., 84 Neb. 110, 120 N. W. 1010 (1909); Barnes v. Trenton Gas Light Co., 27 N. J. Eq. 33 (1876); Commercial Bk. v. Burgwyn, 110 N. C. 267, 14 S. E. 623 (1892); Baker v. Berry Hill M. S. Co., 112 Va. 280, 71 S. E. 626 (1911).

[66] As in: First Nat. Bk. v. Persall, 110 Minn. 333, 125 N. W. 675 (1910); First Nat. Bk. v. Lovitt, 21 S. W. 825 (Mo. 1893); Graham v. Orange Cty. Nat. Bk., 59 N. J. L. 225, 35 Atl. 1053 (1896); Lee v. R. H. Elliott & Co., 113 Va. 618, 75 S. E. 146 (1912).

the bank so as to make the attempted gift complete.[67] The same reasoning applies where the "agent" acted in the transaction solely for another principal. Here there is even less opportunity for holding the buyer, for the agent might be committing a breach of duty to the seller in communicating the facts. This takes care of the numerous cases where there are mutual officers of two corporations one buying from the other, in which the officers of the selling company act for it and not the buyer.[68]

Third. Where the principal has received no benefit from the knowledge of the agent, who is not a transferor, the principal is affected by knowledge possessed by the agent at the time of the transaction, irrespective of the time when knowledge was acquired, if there is an obligation to disclose. If the principal is not bound save where "the notice is given or the information is acquired during the course of the transaction in which knowledge is sought to be imputed," (a favorite expression of the courts), it must be conceded that the difference between this type of notice and that first dealt with is of no practical importance. It would seem fair, also, to agree that, if this is so, there is a doctrine of "imputed notice," which exists aside from the liability of a principal for the acts of his agent. "Absolute notice" in order to be effective, as before pointed out, must come to one who, for the purpose of receiving the notice, represents the principal. And it is true that, normally, knowledge acquired by an agent in the performance of his duties will be considered for all purposes as if the knowledge had been acquired by the principal. But it should not be made an exclusive test when it is sought to hold the principal because his agent has acted or failed to act in a manner which is wrongful because the agent has the information. Knowledge is simply the content of the individual mind and the mind of the agent

[67] Organized Charities v. Mansfield, 82 Conn. 504, 74 Atl. 781 (1909).

[68] *In Re* Marseilles Rwy., L. R. 7 Ch. App. 161 (1871); Waynesville Nat. Bk. v. Irons, 8 Fed. R. 1 (1881); Cocoran v. Snow Cattle Co., 151 Mass. 74, 23 N. E. 727 (1890); Produce Ex. Bk. v. Bieberbach, 176 Mass. 577, 58 N. E. 162 (1900); First Nat. Bk. v. Christopher, 40 N. J. L. 435 (1878); Am. Nat. Bk. v. Ritz, 70 W. Va. 409, 74 S. E. 679 (1912). See also *In Re* David Payne & Co., Ltd. (1904), 2 Ch. 608.

cannot be kept distinct from that of the man.[69] When we wish to know if the engineer of a train was negligent and it is discovered that he knew of an obstruction on the track, it is not necessary to find that he acquired the knowledge while acting in the course of duty. If we are measuring the water in a barrel, we do not care how it got there, though when our only information is as to the amount poured in, we are properly concerned with the question of leakage.

Of course the rule above quoted originated in the well known tendency of the human mind to leak knowledge. In *Warrick* v. *Warrick*,[70] Lord Hardwick, in holding a principal not affected by the knowledge of his solicitor acquired before the transaction in question, says: "It is very probable that Hawkins might have forgotten it in this length of time." And it is conceivable that as a matter of policy and to settle all questions definitely, it may be better to assume in all cases that information which the agent had received in a different transaction has been forgotten. The decisions of the few jurisdictions [71] which consistently reach this result might be sustained on the ground of the convenience of certainty, were it not that the results are opposed to our sense of justice in the great majority of cases. The New Jersey rule, which limits the liability of the principal to that knowledge which he would have acquired had he performed the acts personally,[72] may be defended as a bit of judicial legislation, on the ground that the public policy, which dictates the general rule as to the liability, does not apply to these cases.

These jurisdictions frankly disavow the ordinary rules of liability in their entirety, however much misconception may

[69] Even the Alabama court concedes this: Lea v. Iron Belt Mercantile Co., 147 Ala. 421, 42 So. 415 (1906).

[70] 3 Atkyns 291 (Eng. 1745).

[71] Hall & B. W. W. M. Co., 147 Ala. 421, 42 So. 415 (1906); Houseman v. Girard Mutual B. & L. Assn., 81 Pa. 256 (1876); Barbour v. Wiehle, 116 Pa. 308, 9 Atl. 520 (1887); Grayson Cty. Nat. Bk. v. Hall, 91 S. W. 807 (Tex. 1907); Samuelson v. Gale Mfg. Co., 1 Neb. (unof.) 815, 59 N. W. 809 (1901), *semble*. (?)

[72] Willard v. Denise, 50 N. J. Eq. 482, 26 Atl. 29 (1893).

have caused the departure. But in the other states, the rule is given that the principal is bound only by that knowledge coming to the agent during the agency, but "if the knowledge has come to the agent so close to the transaction in question and so definite that the agent must have it in mind when dealing for the principal," the latter is bound.[73] As pointed out in *The Distilled Spirits,*[74] "this is really an abandonment of the principle on which the distinction is founded." The limitation makes innocuous the error of the first portion; the principal is in fact bound by all the knowledge held by the agent at the time when his duty to act arises. But the dead line created by the court does not have that necessity for its existence which justifies, for example, the "look and listen" rule. Aside from the fact that there is too much variation in the attendant circumstances of the situations to make successful the use of this type of legal presumption, the negative phrasing leads to misunderstandings. Thus in some jurisdictions we find the court announcing in *dicta* the quoted rule as unqualified,[75] though other cases in the same jurisdictions show that the limitation exists as vigorously there as elsewhere.

Furthermore, it creates confusion between "absolute notice" and that based upon knowledge. Thus it was said in *The Distilled Spirits,* where knowledge alone was important; "knowledge communicated to the principal he is bound to recollect, but he is not bound by knowledge communicated to the agent unless it is present at the time of the transaction of which clear and satisfactory proof is required." But when Justice Bradley said that the principal is bound to recollect knowledge communicated to him, he was obviously refering to absolute notice;[76] if this absolute notice is given either to the principal or an agent acting for him, the principal is bound irrespective of his later

[73] Compare Pomeroy's Equity Jurisprudence, 3d Ed., Sec. 672.

[74] 11 Wall. 356 (1870).

[75] Penfield Inv. Co. v. Bruce, 132 Mo. App. 257, 111 S. W. 888 (1908); Neilson v. Weber, 107 Tenn. 161, 64 S. W. 20 (1901); Pacific Mfg. Co. v. Brown, 8 Wash. 347 (1894).

[76] So also Mechem's statement to the same effect: Mechem, Agency, 2d Ed., Sec. 1809.

lack of memory. Thus where a notice of an assignment of an equitable interest is given to the trustee, this is effective ten years later, although in the mean time the trustee has forgotten.[77] But in the case of rights based solely upon knowledge, the "duty to remember" can arise only after the knowledge has been received and the possibility of its being forgotten exists, *i.e.*, when the later transaction arises in which the knowledge is important.[78] For instance, suppose in *Armstrong* v. *Abbott*,[79] where all the officers of a company had witnessed an unrecorded deed of land, purchased by the company at a much later time, the land had been bought by one of the officers for himself. Clearly he would not be bound by notice since there was no reason for him to burden his mind, as a witness to the conveyance, with the fact that such a conveyance had been made. The same is true of other cases where the courts have held that a sufficient length of time had elapsed so that "knowledge could not be imputed."[80]

But the time and manner of acquisition of knowledge may in fact be important. The lapse of time between the acquisition of the knowledge by the agent and the time when he is called upon to act is, however, of no more importance here than in all other cases where knowledge is the fact to be proved. As a matter of proof, it is important to know whether the agent required the knowledge casually or during the course of business. Information casually acquired is easily forgotten. This is true especially where the one receiving it has no reason to suppose at the time that it is important to remember it, either

[77] Burrowes v. Lock, 10 Ves. Jr. 470 (1805).

[78] Even where there may be some duty to remember, there is not the absolute obligation that exists after "absolute notice" has been given. In *Société Générale de Paris* v. The Tramways Union, 14 Q. B. D. 424 (1884), a notice of assignment of shares had been given the officers of a company, but an act of Parliament prevented the rule of Dearle v. Hall from applying. Cotton, L. J., at p. 448, says that the notice was "effectual only for . . . the time during which it must be presumed that the facts remained present in the minds of the directors."

[79] 11 Col. 220, 17 Pac. 517 (1888).

[80] Guaranty Trust Co. v. Koehler, 195 Fed. 669 (1912); Stennett v. Pa. F. Ins. Co., 68 Ia. 674, 28 N. W. 12 (1886); Burton v. Perry. 146 Ill. 71, 34 N. E. 60 (1893).

from his individual standpoint or from that of his principal's. For instance, a director in a bank learns on the street that certain notes have been obtained by fraud. Unless he had a prospective interest in them, he would remember the fact hardly longer than the time used in telling it. If the same notes are presented at the bank subsequently and voted upon at a meeting at which he is present, there is nothing to show that the knowledge is present in his mind. As the burden of proof is on the one seeking to show knowledge,[81] proof that the agent once had the knowledge is not in itself sufficient. On the other hand, if the information was given to the director as an officer of the bank, so that it would not purchase the paper, assuming this would not be absolute notice, there would be additional facts here to show that the director retained the information at the subsequent discounting. This distinction may explain many cases where the principal was not affected by the knowledge which was acquired during the private transactions of the agent.[82]

The method and time of acquisition are important also to determine whether the agent had the duty to communicate, for without this duty there is no fault on the part of anyone and no basis for charging the principal. If the agent acquired casually, or otherwise, for that matter, information which does not seem relevant to his principal's business, there is no duty to act. Thus, where an agent buying horses knows that a certain one has a defect and at the same time the defendant sells that horse to the principal, representing that there are no defects, the principal is not affected by the knowledge which the agent had no reason to communicate as he did not know that the principal was proposing to buy the horse.[83] Or suppose a note teller in a bank learns that a firm in which Adams is a member has been dissolved and that afternoon another teller

[81] Constant v. Uni. of Rochester, 133 N. Y. 640, 31 N. E. 26 (1892); Kirklin v. Atlas S. & L. Assn., 60 S. W. 149 (Tenn. 1907).

[82] Patterson v. Irwin, 142 Ala. 101, 38 So. 121 (1905); Denton Nat. Bk. v. Kenney, 116 Md. 24, 81 Atl. 227 (1911); Shaffer v. M. M. I. Co., 17 Ind. App. 204, 46 N. E. 557 (1897); Wash. Nat. Bk. v. Pierce, 6 Wash. 491, 33 Pac. 972 (1893).

[83] See Lee v. Tarplin, 183 Mass. 52, 66 N. E. 430 (1903).

in the bank discounts a note of the dissolved firm. The bank would be able to hold Adams, though if the first teller had known that the bank was doing business with the firm or was about to take its paper, or if Adams had notified the teller, *qua* teller the result would have been different.[84] In all cases, then, where the agent knows facts which are relevant to the transaction, but which he has no reason to suppose should be disclosed, there is no obligation upon him to speak and, therefore, no breach of duty for which the principal can be held responsible,[85] involved in his failure to disclose.

Again, where the information has been acquired through confidential communications, there is a positive obligation not to disclose. Lord Hardwick undoubtedly had this in mind in *Warrick* v. *Warrick*. The agent or solicitor has no right to use information confidentially, for any purpose save that for which it was given. If he cannot use it for his benefit or for the benefit of the one who subsequently becomes his principal, it would seem that there should be a corresponding right not to have the knowledge operate to his detriment. For all subsequent purposes, it should be treated as non-existent and there is, therefore, no duty to reveal.[86] This is true even in the case of a preference, where the preference is not obtained because the agent did in fact have the knowledge.[87]

In illustration of the general principle, it may be worth while to notice, also, the cases where a principal is held liable because his agent did not have the information he should have had. Here the principal is held for the neglect of his agent in the same manner as for the neglect of the agent to

[84] "It would be a burden upon the bank to hold that all its officers must anticipate the offer to the bank of all doubtful paper of which he (a director) might have knowledge." Thompson v. Village of Mecosta, 141 Mich. 175, 104 N. W. 694 (1905). See also Curtice v. Crawford Cty. Bk., 118 Fed. 390 (1902).

[85] Phoenix Ins. Co. v. Flemming, 65 Ark. 54, 44 S. W. 464 (1898); Vietor v. Spalding, 199 Mass. 52, 84 N. E. 1016 (1908); Casco Nat. Bk. v. Clark, 139 N. Y. 307, 34 N. E. 908 (1893)

[86] Roderick v. McMeekin, 240 Ill. 625, 68 N. E. 473 (1903); Mack v. McIntosh, 181 Ill. 633, 54 N. E. 1019 (1899).

[87] Downer v. Porter, 116 Ky. 422, 76 S. W. 136 (1903); Akers v. Rowan, 33 S. C. 451, 12 S. E. 165 (1890).

communicate known facts. If the failure to acquire the information was a failure by the agent in the performance of his duties, the principal is liable. For instance, if an attorney, upon looking at a deed, should know that its wording indicates a fraud upon a third person, his failure to note that fact will subject his principal to the same liability as if he had noticed it and communicated it to the principal.[88] But if the failure to acquire the information is the failure of an individual and not of the defendant's agent, the latter is not bound. Thus, where a bank director is also president of another company and, as such, should have acquired certain information, the bank is not affected unless its director did have the information,[89] though in actions in which the agent is a party, the agent may be treated as if he knew.[90] For the same reason, a principal is not liable for the failure of a sub-agent to give information to the agent,[91] nor is he affected by the knowledge held by the partner of his agent.[92] In these cases the agent has committed no breach of duty.

Discarding, then, the fictions and presumptions, it appears from the results of the cases that the principal is charged with the knowledge of all facts which it is the agent's duty to communicate, irrespective of the time and manner of acquisition.[93] It is surplusage to add that the agent is not bound to disclose facts which he has forgotten, when there was no duty to remember, nor those which he had no reason to suppose were

[88] Kennedy v. Greene, 3 My. & K. 699 (1834).

[89] Mann v. Second Nat. Bk., 34 Kan. 746, 10 Pac. 150 (1886).

[90] Greenville Gas Co. v. Reis, 54 Oh. St. 549, 44 N. E. 271 (1896); Gay v. Y. M. C. C., 37 Utah 280, 107 Pac. 237 (1910).

[91] North British M. I. Co. v. Union Stockyards Co., 120 Ky. 465, 87 S. W. 285 (1905).

[92] Scott v. Chactaw Bk., 4 Ala. App. 648, 59 So. 184 (1912); Wittenbrock v. Parker, 102 Cal. 93, 36 Pac. 374 (1894). Conversely one affected by notice in one capacity (executor) is not affected, by that fact alone, personally: Gorham v. Sayles, 23 R. I. 449, 50 Atl. 848 (1901).

[93] Compare: Wade, Notice, 2d Ed., Sec. 687. The following are a few of the many cases reaching this result: Dresser v. Norwood, 17 Comm. Bench, N. S. 466 (1866); Campbell v. First Nat. Bk., 22 Col. 177 (1896); McClelland v. Saul, 113 Ia. 208, 84 N. W. 1034 (1901); Underwood v. Fosha, 150 Pac. 571 (Kan. 1915); Trentor v. Pothen, 46 Minn. 298, 49 N. W. 129 (1891), *semble;* Holden v. N. Y. & Erie Bk., 72 N. Y. 286 (1878); Deering v. Holcomb, 26 Wash. 588, 67 Pac. 240 (1901); Shafer v. Phoenix Ins. Co. 53 Wis. 361, 10 N. W. 381 (1881).

relevant, nor those of which he had obtained knowledge through confidential communications.

Fourth. Where the agent was committing an independent tort, though purporting to act for the principal, the latter is not affected by the agent's knowledge, although merely an adverse interest possessed by the agent does not affect the principal's liability.

This last class of cases includes those where the agent having a duty to disclose had an adverse interest. It is said very generally that "knowledge will not be imputed," because of the assigned reason that the whole law of imputed notice is based upon the presumption that the agent will reveal the facts known to him in relation to which he has a duty to act and that there can be no such presumption where he has an adverse interest. But of course this reasoning is purely evasive. If the presumption were one of fact, the principal could show in any case that the agent did not communicate. The courts evidently mean that the presumption is conclusive. A "conclusive presumption" that one has performed his duty means that he is treated as if he had performed it and this is true normally only against the one owing the duty. If the principal is affected, therefore, it is because he is made liable for the fault of his agent. If he is so liable generally, a reason for excusing him must be found in the principles of agency. If it were true that the adverse interest of a servant or agent relieves the principal for wrongs committed within the scope of the employment, the fictitious phrasing would be subject to criticism only as to its form. But in general the adverse interest of an agent does not of itself affect the responsibility of the principal. Liability ceases only where the act was not performed by the actor *qua* agent or servant; where there were no elements of representation in it.[94]

If there is a departure from this result in the cases dealing with notice part of the blame may be put upon the use of

[94] Of course this limitation of liability exists only where there has been no reliance upon the fact of agency.

formulae. But there are other reasons for a variation. The obligation to holders of previous equities is not so clear and direct as the duty not to injure the property or person of another physically. The sphere of liability for physical damage to tangible property has always been considerably larger than that for injuries to intangible rights. Moreover the duties were evolved in different courts and the chancellor was in a better position than were the common law judges to disregard the fiction of the identity of principal and agent where it would be inequitable not to do so. For these reasons, though the results of the cases do not support the rule that "notice is not imputed" where the agent has an adverse interest, the liability of the principal is, perhaps, not the same as it would have been if evolved in strict conformity to the general principle of which it is a part.

That it is incorrect to say that an adverse interest on the part of the agent affects the liability of the principal is proved by the cases, too numerous to need citation, holding to the contrary by necessary implication, where the principal is held to be bound by the knowledge of an agent who receives compensation based upon the successful completion of the transaction. There is an obvious interest here to conceal any information which would prevent the earning of the compensation. With the elimination of the previously discussed cases where the "agent" was merely a transferor and was not purporting to act as agent all the cases in which the principal has been held not bound by the knowledge of an agent having an adverse interest have been those where the agent was committing an act, which aside from the non-disclosure of the facts, was a fraud upon the principal or a third person. The agent, using the opportunity afforded by his position, acted for his own individual ends. So, as there is no reliance upon the fact of agency by the injured person, the real measure of the act may be determined and liability apportioned accordingly. If the agent was considering principally and fraudulently his own interests, it is his personal act; if not, the existence of an adverse interest has no effect upon the liability of the principal.

There is some judicial sanction for this method of approach. Lord Chelmsford in *Espin* v. *Pemberton*,[95] said: "I would rather say that the commission of the fraud broke off the relation of principal and agent, or was beyond the scope of the authority and therefore it prevented the possibility of imputing the knowledge to the principal." In *Allen* v. *South Boston Ry. Co.*,[96] Justice Field, referring to this statement says, "It has been suggested that the true reason for the exception is that an independent fraud committed by an agent is beyond the scope of his employment. . . . On this view such a fraud bears some analogy to a tort wilfully committed by a servant for his own purposes and not as a means of performing the business entrusted to him by his master." And, in *Gunster* v. *Scranton Illuminating Heat & Power Co.*:[97] "If it be urged, as in some cases, that the principal, having put the agent in his place, should, as a matter of public policy, be held answerable for all the latter does, a sound answer is suggested in *Allen* v. *South Boston Ry. Co.*, that an independent fraud committed by an agent on his own account is beyond the scope of his employment and bears analogy to a tort wilfully committed by a servant for his own purposes and not as a means of performing the business entrusted to him by his master."

Examples of the scope of this rule are found where an agent is, unknown to his principal, acting for an adverse party and is, therefore, committing a breach of duty which would be sufficient to terminate the relationship.[98] Also where the agent induces the principal to purchase property or loan money, the purpose of the agent being to derive a fraudulent advantage

[95] 3 De G. & J. 547 (1859).

[96] 150 Mass. 200, 22 N. E. 917 (1889). See also Mechem, Agency, 2d Ed., Sec. 1816.

[97] 187 Pa. 327, 37 Atl. 550 (1897). The language of this case is quoted with approval in Am. Nat. Bk. v. Ritz, 70 W. Va. 409, 74 S. E. 679 (1912). The application of the rule to the facts seems incorrect.

[98] Benton v. Minn. T. & M. Co., 73 Minn. 498, 76 N. W. 265 (1898); Burton v. Palm, 9 S. W. 182 (Tex. 1888).

out of the money so paid.[99] Even more clearly, it appears that the principal is not treated as if having knowledge of the very fraud which is being perpetrated upon him, as where it is sought to affect a bank with the knowledge of an officer that it was insolvent, the officer with knowledge being the one who, in defaulting, created the insolvency.[100] Equally without reason is the effort to hold one upon the ground of estoppel for acts done by an agent in excess of authority, where he alone knows the facts, or the facts are known only by a fellow conspirator who profits from the wrongdoing.[101]

In another large group of cases, in some of which it might be difficult to apply the rule suggested here, the action is brought or defended by one who colluded with the agent to keep the knowledge from the principal. There is an obvious reason for not subjecting the principal to liability in favor of one who has been a cause in producing the injury and the "knowledge is not imputed" to the principal to prevent him from recovering upon an obligation or retaining property.[102] This is true although there was no thought of fraud against him in the concealment.[103]

The cases involving suretyship bonds may be put upon special grounds for there is first to be interpreted the contract. It may well be that a corporation in whose favor the bond runs

[99] Kennedy v. Green, 3 Mk. & K. 699 (1834), *semble;* Dillaway v. Butler, 135 Mass. 479 (1883); Camden S. D. & T. Co. v. Lord, 67 N. J. Eq. 489, 58 Atl. 607 (1904); New York v. Tenth Nat. Bk., 111 N. Y. 446, 18 N. E. 618 (1888); Benedict v. Arnoux, 154 N. Y. 715, 49 N. E. 326 (1898); Brooklyn Dist. Co. v. Standard D. & D. Co., 193 N. Y. 551, 86 N. E. 564 (1908); Melms v. Pabst Brewing Co., 93 Wis. 153, 66 N. W. 518 (1896).

[100] Perth Amboy G. Co. v. Bk., 60 N. J. Eq. 84, 45 Atl. 704 (1900).

[101] Watkins Salt Co. v. Mulkey, 225 Fed. 739 (1915); Merchants' Nat. Bk. v. Nichols, 223 Ill. 41, 79 N. E. 38 (1906); Houghton v. Todd, 58 Neb. 360, 73 N. W. 634 (1899); Clement v. Young McS. A. Co., 70 N. J. Eq. 677, 67 Atl. 82 (1906); *In Re* Millward C. C. Co., 161 Pa. 157, 28 Atl. 1072 (1894).

[102] State Sav. Bk. v. Montgomery, L. R. 4 Ch. 35 (1868); Schutz v. Jordan, 141 U. S. 213 (1891); Waite v. Santa Cruz, 89 Fed. R. 619, aff. 184 U. S. 302 (1898); Allen v. McCullough, 99 Ala. 612, 12 So. 810 (1893); Merchants' Nat. Bk. v. Demere, 92 Ga. 735, 19 S. E. 38 (1894); Findley v. Cowles, 93 Ia. 389, 61 N. W. 998 (1895); Cowan v. Curran, 216 Ill. 598, 75 N. E. 322 (1905); St. Bk. of Moore v. Forsyth, 41 Mont. 248, 108 Pac. 914 (1910); Morrill v. Bosley, 40 Tex. Civ. App. 7, 88 S. W. 519 (1905).

[103] Trader's and T. Bk. v. Black, 108 Va. 59, 60 S. E. 743 (1908).

does not guarantee the fidelity of its employees in reporting the defalcations of others, as that would cause it to lose the protection which it wishes to have.[104] But where it is assumed that the employer is responsible for *some* failures of his employees to notify him, the distinction is drawn between the situation where the ones failing to report were in collusion with the one defaulting, in which case the principal is not bound,[105] and that where the failure of the employee was due to some cause other than conspiracy against the principal, in which case he is liable.[106]

Finally, the principal may be liable for his own fault in the selection of an agent where the principal "studiously refrains" from acquiring the knowledge which would prevent his being a *bona fide* purchaser, or where he employs one whom he knows to be unreliable or one who probably will not reveal the pertinent facts. He is held because of his own carelessness or wrongdoing. This explains many of the English cases which, otherwise, would seem to be at variance with the American decisions. "If a mortgagee is imprudent enough to entrust his interests to the mortgagor, being a solicitor, he may do so and take all the consequences.[107] In *Le Neve* v. *Le Neve,*[108] where the solicitor was acting for a husband in a settlement and also for the wife, the latter was held bound by the solicitor's knowledge that the husband's action was in fraud of another. So in *Boursot* v. *Savage,*[109] where the purchaser employed the seller as solicitor in the transaction, it was held that he took subject to the equities of the solicitor's *cestui que trust.* This point is well brought out in the case of *Pine Mountain Iron & Coal Co.*

[104] Fidelity & Dep. Co. v. Courtney, 186 U. S. 342 (1902).

[105] Am. Surety Co. v. Pauly, 170 U. S. 133 (1898); Saint v. Wheeler W. M. Co., 9 Ala. 367, 10 So. 539 (1892); Van Buren Cty. v. Am. Surety Co., 137 Ia. 490, 115 N. W. 24 (1908).

[106] Guaranty Co. v. Mechanics Sav. Bk., 183 U. S. 402 (1902); Minor v. Mechanics Bk., 1 Pet. 46 (1828); Franklin Bk. v. Cooper, 36 Me. 179 (1853).

[107] Lord Chelmsford in Espin v. Pemberton, 3 De G. & J. 557 (1859).

[108] Amb. 436 (1747).

[109] L. R. 2 Eq. 134 (1866).

v. *Bailey.*[110] In this case the buyer's agent acted also as agent for the seller, this being known to both parties. During this period of the transaction, as the court said, the buyer was affected by any knowledge held by the agent in regard to the seller's title, which it was the agent's duty to reveal.[111] But as the agent afterwards had secretly bought the property and sold it to the principal while pretending to act as agent for the seller and his principal, his action was fraudulent, aside from the fact of non-disclosure of the equities. At the time the principal bought the property, then, the agent was acting wholly for himself, and that being the time when the obligation to communicate the facts arose, the principal was not bound by a knowledge of them.

Summarizing the results of the cases as they appear to the writer: 1. Where one bases his rights upon the giving of notice to another, the notice must be given to one, who, at that time, was authorized or held out as authorized to act for that other for the purpose of receiving notice. If this is done it is immaterial whether or not the agent was perpetrating a fraud upon the principal unless this was known to the one giving the notice. 2. Where the right is based upon the possession of knowledge of another, some fault in that other or his agent must be shown. If the agent having the knowledge was the one through whose act the principal claims, the latter is bound irrespective of the method of the acquisition of the knowledge or of any unloyal frame of mind on the part of the agent (*Quaere,* upon authority). If the principal acquires the title independently of the act of the agent with knowledge, but the latter has an obligation to divulge or to act in reference to it, the principal is bound if the agent negligently or wilfully fails to perform his duty, unless such failure was a consciously wrongful act not done for the purpose of performing the duties

[110] 94 Fed. 258 (1899).

[111] *Accord:* Witter v. McCarthy Co., 111 Cal. XVII, 40 Pac. 969 (1896); Wm. Berganthal Co. v. Bk., 102 Minn. 138, 112 N. W. 892 (1907); Blackwell v. Britt. A. M. Co., 65 S. C. 105, 43 S. E. 395 (1902). But see: Randolph v. Ballard Cty. Bk., 142 Ky. 145, 134 S. W. 165 (1911).

of agent. But even in the latter case, as in all others, the principal is liable if he personally is at fault. Where neither he nor his agent is at fault, there is no liability and no "imputed knowledge."

III. NOTICE TO AN AGENT THROUGH HIS PRINCIPAL.

Although only incidentally relevant to the questions under discussion, it may not be amiss to consider briefly some of the conclusions reached by Mr. Edwin H. Abbott in an article in the HARVARD LAW REVIEW,[112] as the questions raised there seem susceptible to the foregoing analysis. Mr. Abbott argued that, as a corporation obviously has what may be considered the equivalent of knowledge of all facts as to which a memorandum is entered upon its records, where an agent acts for it, the corporate principal should be subjected to liability as if the agent knew the facts. To reach this conclusion, it seemed to be necessary to disagree with the opinion in *Cornfoote* v. *Fowke*.[113] In that case, an agent, in making an agreement to lease a house, innocently misrepresented that there were no objectionable features. His principal knew that there was an adjacent brothel, but the court held that his knowledge was not a defence in an action brought by him upon the agreement to lease. Though we may agree that the other party should have the right to withdraw from the agreement upon learning the facts,[114] the court's reasoning that there was not fraud of any sort, in the absence of a conscious concealment on the part of the principal, is sound. If knowledge is imputed because of the identity of principal and agent, we would be driven to Justice Holmes' explanation that the court balked at the manifest absurdity of extending the identification to this extent.[115]

[112] Vol. 26, p. 237.
[113] 6 M. & W. 358 (Eng. 1840).
[114] See Pollock, Torts, 9th Ed., p. 312.
[115] Common Law, p. 231.

If, however, "imputed knowledge" is but a method of indicating a principal's liability when some one has been at fault, the representation of an innocent agent cannot be added to the knowledge of an innocent principal to create "imputed fraud."

To illustrate by a case that avoids the specific difficulties of *Cornfoote* v. *Fowke,* but which serves to illustrate the principle. Smith gives to his agent, Jones, a general authority to buy and sell registered cattle. In pursuance of this authority, Jones buys from X and later sells to Y a cow which in fact has a defect and in which Robinson had an equity. Smith, the principal, knew these facts in regard to the cow at the time of the purchase and sale but did not know that his agent had dealt with this particular animal. Unless Smith had some reason to suppose that the animal would be purchased for him, is there any rational ground for holding that the rights of the purchaser Y would be increased by Smith's knowledge; or that Robinson's equity would not be extinguished at the time of purchase; or that Smith's knowledge would prevent him from bringing an action for deceit against X if the other elements of deceit were present? Of course if there was either carelessness or intentional concealment of the facts from the agent, this assuming that a knowledge of the facts ought to have been disclosed, Smith would have been at fault as to Robinson and as to Y. So was an insurer who after learning that a ship, which he had instructed his agent to insure, was destroyed, failed to notify the agent.[116] But unless there can be found a duty to communicate and a breach of that duty, there is no ground for imposing liability, aside from the pure fiction of the identity of principal and agent. *Cornfoote* v. *Fowke* is of course clearly distinguishable from the cases where "absolute notice" was given to the principal. In cases of that type the principal is bound by the knowledge as soon as the act of giving notice has been completed and it is immaterial after that whether he acts individually or through an agent. The ques-

[116] McLanahan v. Uni. Ins. Co., 1 Pet. 170 (1828); Ludgate v. Love, 44 L. T. (N. S.) 694 (C. A. 1881), cited by Mr. Abbott, is of this type.

tion of knowledge is immaterial. In three of the American cases cited by Mr. Abbott as *contra* in principle to *Cornfoote* v. *Fowke,* a *cestui que trust* or a lienholder of a creditor had given notice to an agent of a debtor corporation of his interest in the chose in action.[117] In all of them, other agents who did not know the facts made the payments to the original creditor and the payment was not held good. In all of these we find notice of the "absolute" type;[118] upon its being given, the rights of the parties crystalized into a distinct obligation on the part of the debtor to pay subject only to the notice. Moreover, aside from this, it is clear that there was a breach of duty on the part of the ones receiving the notice in failing to inform all other agents who at any time would have authority to act in the matter. This point is brought out in the fourth American case cited.[119] These decisions, then are not opposed to the fundamental reasoning in *Cornfoote* v. *Fowke.*

Briefly, when an agent acts without knowledge, a principal should be liable as though the agent had the knowledge when: first, "absolute notice" has been given; secondly, there is an obligation upon the principal to inform the agent[120] or a duty upon the agent to inform himself, from the records of his principal or otherwise. To extend the principal's liability beyond this point is to accept at their face value the fictions found necessary by the courts in the development of principles and to refuse to accept the principles on which they are based.

Warren A. Seavey.

Indiana University.

[117] Mechanics' Bk. v. Seton, 1 Pet. 299 (1828); Curtice v. Crawford Cty. Bk., 118 Fed. (1902); Elliott v. Trust Co., 189 Mass. 542, 75 N. E. 944 (1905).

[118] This is true also in the English cases cited: Mayhew v. Eames, 1 Car. & P. 350 (1825); Willis v. Bk. of England, 4 Ad. & E. 21 (1835).

[119] Gibson v. Nat. Park Bk., 98 N. Y. 87 (1885), where there was an attachment of a chose in action by service of process upon the debtor. "When the officers of this bank had notice of the service of the attachment, it was their duty to take immediate steps to impound the funds in their hands, and prevent their payment by any of its agents, except to a *bona fide* holder of its obligation."

[120] Upon this ground, with an appropriate plea, the defendant should have succeeded in Cornfoote v. Fowke.